Supreme Court, U.S.
FILED

091265 FEB 16 2010

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Tore O. Arnesen

v.

The Court of Appeals for Veterans Claims,

On Petition for writ of a certiorari to:
Court of Appeals for Veterans Claims

Tore O. Arnesen
1330 Bellaire St.
Broomfield, CO 80020
(303) 465-3353

QUESTIONS PRESENTED

Question 1: Appeals are normally decided based on the merits of the claim and its compliance with the evidence and law, but doing appeals effectively and fairly is also dependent on the judge(s) and court(s) competence and integrity. If a claim with merit and good conformance with law is rejected, due to incompetence, bias, or dishonesty by judge(s) or court(s), how can one obtain a fair trial and justice?

Question 2: Can judges be predisposed or biased toward accepting the validity of decisions of other judges, who are their peers and therefore be somewhat reluctant to acknowledge incompetent, improper or dishonest judicial behavior may have occurred. In so, how likely is it that a claimant will obtain a fair and impartial trial or justice?

Question 3: The Supreme Court (SC) does not usually consider cases raised do to simple error, but what about cases appealed due to <u>intentional</u> error; to include dishonest criminal acts or constitutional violations by government and court officials? If so, when representatives of federal government agencies and federal court's, including judges, act irresponsibly, with bias or dishonesty, and they intentionally cover up misbehavior can they and should they be held accountable by the SC?

Question 4: Because employees of both the courts and government agencies are <u>all</u> federal government employees can they be biased toward each other, and if so are government employees most likely to consider themselves above approach for misbehavior

and therefore likely end up above the confines of the law and the justice system?

Question 5: The Justice Department (JD) has statutory authority to defend the US in Court, to prevent crime and seek punishment of unlawful behavior, and also to ensure fair and impartial justice for all Americans and also acts as defense attorney to help the VA or other government agencies. When the DJ tries to win a decision (against an American citizen) that is not in compliance with law and helps covers up misbehavior by government officials, does the DJ have a conflict of interest or can they both help the government win unjust decision and still ensure fair and impartial justice to an American citizen?

Question 6: As the highest Court does the Supreme Court (SC) have ultimate and primary responsibility to ensure the integrity of the federal court system and to protect American citizens against judicial misbehavior, to include dishonest or irresponsible behavior, and criminal or constitutional violations by members of lower courts? If the SC elects not to consider a case of judicial misbehavior, does it have to accept some responsibility for the loss of the integrity of the judicial system and perhaps even for covering up criminal and constitutional violations?

PARTIES TO PROCEEDING:

Veterans Administration,

Justice Department,

The Court of Appeals for Veteran Claims,

and

The Court of Appeals for the Federal Circuit

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW:

1) The unpublished opinion of the United States Court of Appeals for Veteran Claims (CAVC) appears at Appendix 'A' to the petition as recorded in the Federal Reporter:
2) The unpublished opinion of the United States Court of Appeals for Federal Circuit (CAFC) appears at Appendix 'A' to the petition as recorded in the Federal Reporter:

JURISDICTION:

A timely petition for rehearing was denied by the United States Court of Appeals to the Federal Circuit; December 15th, 2009, and a copy of the order denying rehearing appears in Appendix 'B'.

CONSTITUTIONAL/CRIMINAL PROVISIONS

1. The CAVC & CAFC are denying myself the constitutionally guaranteed and established right of all U.S. citizens to having a fair trial
2. Both the CAFC & CAFC are violating the constitutional requirement for the separation of power between the executive & judicial branches of the federal government
3. Federal government officials of the executive branch of the federal government at the Veterans Administration (VA) and at the Department of Justice (DJ) are committing

intentional errors; dishonest, frivolous, and irresponsible acts, to include criminal misbehavior; and are obstructing justice by participation in fixing or rigging of CAVC & CAFC decisions.

4. Judges and others members of the court's at the CAVC & CAFC are committing judicial misconduct and criminal acts, to include; intentional obstruction of justice, dishonest and irresponsible behavior, intentionally rigging or fixing of court decisions in favor of the government. They also committed constitutional violations by denying me a fair trial, and by violating the separation of power between the executive and judicial branches of government. Since judges are under oath intentionally covering up both government and judicial misbehavior also includes the criminal act of perjury.

STATEMENT OF THE CASE

I am disabled veteran with osteoarthritis (DJD) of both knees. My right knee disability was filed in 1970 during discharge from active service as a combat veteran in Vietnam. I was granted a right knee disability shortly after. My original left knee disability was filed later in 1970 with in a year of service, but was not granted and made effective until 1986. My disability claims have been almost continuously prosecuted from 1970 to the present or for almost 40-years. Presently, there are two issues in my claim as follows:

1) **Increased disability both knees**-(see discussion to follow below)
2) **Earlier Date for Left Knee Disability**-The VA's rejection of my original left knee 1970 disability claim was wrought with numerous errors, which took years even decades to get the VA to acknowledge and address. Some of which to date are still have not been fully and fairly addressed. These are all undisputable clear and unmistakable, as well as obvious factual errors, which are factually and undisputedly documented in my service and VA medical records.

While both my claims are valid and were improperly denied by the VA and subsequently by the court's (CAVC & CAFC), to save space and in respect of the time allowed for an Appeal to the Supreme Court (SC), I will <u>only</u> briefly discuss and summarize <u>one</u> of the two claims before these courts. None-the-less, the same dishonest and irresponsible actions by the VA and the two courts occurred regardless of which of the two claims in my case is

considered and the SC needs to understand that my Appeal is for both of my claims.

Both claims were supported by the evidence of record and law, and if fairly and honestly adjudicated would have manifestly changed the outcome of my case. These same two issues have been disputed for decades and have been brought to the Court of Appeal for Veteran Claims (CAVC) on three separate occasions and remanded back the first two times with merit and for further development.

During the present or third appeal of these same issues, even though all additional evidence obtained during these previous remands further supported my claim, in a single judge CAVC decision both of my claims were rejected and a request for a panel of judges from this court to review this decision was denied.

I then appealed my claim to the CAFC. The DJ representing the VA repeatedly requested for the CAFC to dismiss my claim without considering it, which they did. I then requested CAFC reconsider its decision, which on Dec 15, 2009 was finally done, but denied.

In regard to my claim for a higher disability rating for both knees, I am a disabled Vietnam era combat veteran with degenerate joint dieses (DJD) or osteoarthritis of both knees. I received a 10% right knee disability during my service period in 1970 and subsequently my claim for left knee disability later in 1970 was denied. Then, in 1986 I finally received a left knee disability for a combined 20% disability for both knees.

DJD is slowly progressive chronic dieses and not surprisingly my condition has significantly worsened

during the last almost 40 years, but my VA disability rating has remained the same or unchanged. This is because that the VA primarily relies on and uses a unique Range-of-Motion/Loss-of-Motion (ROM/LOM) diagnostic method for rating DJD knee disabilities.

The VA's ROM/LOM method was developed 65-years ago (1945) and has basically remained unchanged to the present date. The VA is the only medical organization currently using this unique and outdated method for rating DJD disabilities. Many medical advances for evaluating and treating DJD disabilities have been developed during this period.

Other medical organizations primarily rely on X-Rays, MRI's or other imaging or radiological methods rather than ROM/LOM for diagnosing the severity of DJD. Therefore, the VA's unique diagnostic method does not represent current or standard medical practice.

I have researched, and there are no texts in medical libraries or medical schools teaching or supporting use of the VA's unique ROM/LOM method for rating DJD disabilities. You would have to search medical libraries archives to find such a document. On the other hand, all currently available medical texts explain rating DJD disabilities by use of radiological evidence, such as X-Rays.

In fact evidence I submitted in peer reviewed medical texts describe ROM/LOM specifically state that this ROM/LOM is "not a good or viable method for evaluating DJD disabilities" and that in fact "...many patients with severe arthritis often have good ROM".

None of the various factual medical evidences discussed above was ever refuted by the VA or

courts. It has simply been ignored and arbitrarily dismissed by them without giving a reason or any justifiable or reasonable basis for doing so.

Over the decades, many veterans (including myself) have challenged the use of ROM/LOM for rating DJD, but for one rare minor exception, to little or no avail. Because of the controversy associated with this unique diagnostic method, in 2002 to 2003 the VA commissioned a panel of medical physician experts, who specialize in DJD disabilities, to review the VA's present diagnostic method and to render an independent and well qualified opinion on the VA's unique method, which they did.

Not surprisingly, they concluded that the VA's ROM/LOM method was outdated and did not meet current medical standards (See FR Doc 03-2119; Federal Register; Feb 11, 2003, Volume 68, Number 28, pgs 6997-7035; 38 CFR Parts 3 and 4 "Schedule for Rating Disabilities of the Musculoskeletal System-Proposed Rule").

This panel made specific recommendations for improving and updating the VA's diagnostic method to better meet current medical practice, which in 2003 the VA initially agreed to do, but subsequently changed their mind and have continued with the use of their present outdated method. In doing so, they provided 'no' equivalent qualified expert medical opinion to refute the expert panel's findings; or to show that their present method was equal or equivalent to current medical practice; nor did they indicate that they had determined whether staying with the current method was reasonable and fair to veterans and that it would not harm them in any manner.

The VA simply stated that their present ROM/LOM method is being retained because it is "simple" and "objective". Whereas, the expert medical panel had shown that "pain" (not ROM/LOM) is the primary symptom for determining the severity of DJD disabilities. While evaluating pain is clearly more subjective and difficult to asses than ROM/LOM, this certainly does not justify still using an outdated method that does not meet current medical standards.

If the VA's primary objective is to use an easy and objective method, and in doing so they are willing to sacrifice accuracy and fairness, is this reasonable or justifiable? I and obviously other veterans, including the expert medical panel, do not think so. In fact, the expert medical panel pointed out that X-Rays are also an "objective" method that was presently being under utilized by the VA.

In my particular case, all examining physician based on X-Rays, surgical records, LOM, etc., have determined that I have moderate to severe DJD of both knees, and have concluded that my condition has gradually worsened over the last forty years (which is the normal pattern with DJD), whereas, with the VA's ROM/LOM method, I do not even rate having mild arthritis and my condition has not significantly changed or worsened.

Since both methods give completely different results and the undisputable fact that these two different findings are directly contradictory with each other, means something is obviously unfair and wrong here! They can not both be valid and one has to be in error. I believe every one, including those at the VA, JD, and lower courts, all know that it's the VA's method which is in obvious error.

Unlike with other disabilities where the VA relies on the examining physicians, who are clearly the best qualified to determine the severity of a patients disability, the physician's opinion is considered by the VA as a secondary and most often an irrelevant consideration for rating the severity of DJD knee disabilities. This makes little or no sense, it also runs counter to standard or good medical practice. No one is better qualified than the examining physician most responsible for the treatment of a patient for best, most fairly, and accurately determining the severity of their patient's medical problems

The fact that the VA initially concurred with this panel of medical experts that its present diagnostic method does not meet current medical standards and that (not surprisingly) it is out of date, but then they still elected to disregard well qualified medical advice is disturbing. This means that the VA is intentionally not giving veterans the care they deserve and have been promised and this represents irresponsible behavior; as well as unethical medical treatment; and dishonest or even criminal activity by the VA.

In my claim I showed that if the VA updated their diagnostic method to meet current medical standards as outlined by the expert medical panel, my disability would be increased from 10% to up to 30% for each knee. Neither the VA nor the single CAVC judge challenged, refuted or in any way documented disagreement with this evidence. Which means by continuing with their present outdated diagnostic method and in rejecting my claim for increasing my disability, they are also intentionally harming me by providing me with a lower disability

then I rightfully deserved or would receive based on current medical standards. This raises additional concerns about the VA's fairness to veterans, as well as other ethical and criminal issues.

When ever I watch VA officials on C-Span or at other public venues they invariably state that they always give veterans the "best and highest level of care and treatment possible", but in this particular instance, this is clearly not true.

The VA should always be required to use good and current medical diagnostic methods that best and most fairly determine a veteran's disabilities and as accurately and fairly as possible determines the actual severity of the veteran's condition. Doing otherwise represents dishonest and irresponsible behavior, and doing so intentionally represents unethical and even criminal behavior.

As mentioned, I rightfully appealed the VA's obviously unethical and medically irresponsible decision to the CAVC. Unfortunately and also surprisingly, in a single judge decision it unfairly rejected my claim.

The CAVC single judge's determination was that under current law the courts can not intervene even when the VA intentionally acts improperly, such as when they use outdated diagnostic methods not meeting current medical standards; or even if they harm veterans. This decision is not only very disturbing, but clearly in error and certainly not in compliance with law or past practice of the courts.

Only a biased, irresponsible, and dishonest judge would intentionally cover up obvious misbehavior by the VA and allow them to intentionally harm veterans.

It's important to note that in the past, this very same diagnostic method had been modified and revised by the courts, so there was clear precedence for doing so again (See "Multiple Ratings for Knee Disabilities 23-97"). While there are clear similarities between this past case and mine, due to the expert medical panel's findings there was an even better and more compelling evidentiary and legal basis for the court to have intervened in my case then there was in this past court decision.

The judge at CAVC did not even acknowledge whether in his decision the VA's obvious irresponsible and dishonest decision to disregard expert medical opinion and to continue using its outdated substandard diagnostic method was even considered by the court. The judge appears to have simply ignored and completely disregarded this dishonest and irresponsible behavior by the VA, which based on the expert panels findings about the VA's diagnostic method was clearly a valid and reasonable issue and concern for me to have raised and also vital for a judge to have considered.

Based on the specific statute(s) that I presented, when government officials act badly, irresponsibly or frivolously under current law the court can intervene to protect veterans. Thus, an unbiased, honest, and responsible judge would have and should have by law intervened to protect veterans like me by requiring the VA to upgrade its outdated diagnostic method to meet current medical standards.

When the VA elected to disregard well qualified expert medical opinion, it certainly had an obligation and burden under the law to show to the CAVC's satisfaction that continued use of their

outdated and substandard method posed no harm to veterans and would fairly and accurately determine the severity of veteran's disabilities. The fact that this did not occur demonstrates beyond any reasonable doubt this judge is biased and dishonest.

The fact that I had presented evidence, which was not refuted, showing that I was harmed by the VA's present outdated diagnostic method and that this reasonable complaint was arbitrally dismissed clearly demonstrates the judge was acting irresponsibly, illegally, and unfairly.

I cited various other specific federal statutes that were directly relevant to my claim, which were also not complied with, never refuted or disputed by the VA or CAVC, and were also simply arbitrarily dismissed by this judge. I also provided factual evidence of record that directly contradicted the VA's findings, which was also never refuted or disputed, and this evidence was also arbitrally dismissed by the court with no explanation or any cited reasonable basis for doing so.

The fact is that this judge never provided a detailed or compelling argument based on the evidence, facts or law for explaining and supporting his decision. He simply and arbitrally stated it.

So, it is difficult, if not impossible for anyone to determine or evaluate how fair and well thought out this decision was. The judge apparently expected any reviewers of this decision, including myself, to simply accept it on faith, and not to be concerned about whether it was fair; or just; or based on a well crafted and/or thoughtful legal basis; or if it was supported by the evidence, law, and compelling reasoning or logic.

This judge's arbitrary decision and the subsequent arbitrary or unexplained decisions by CAVC & CAFC for not reconsidering this seriously flawed and dishonest single judge decision is troubling. These two courts must have a fair and objective process for determining when to or whether to review and reconsider a decision and even the most cursory review of this single judge decision would have revealed serious deficiencies, and ethical issues about both the VA's and this single judge's actions and behavior.

The courts clearly wanted this case to finally end, and to do so as expeditiously as possible. They accomplished this by ensuring that this dishonest single judge's fixing and rigging of this decision in favor of the VA would most likely never be reviewed by others. As the record shows, they have succeeded.

Essentially, the courts have knowingly disregarded bad behavior by government and court officials and have misrepresented the relevance and importance of certain key facts and statutes. Thus, they have intentionally dishonestly skewed and resolved all facts, evidence, and laws unfairly in favor of the VA and this biased single CAVC judge.

Most disturbing, is that there was not a single judge or other official in either court that had the courage or high moral standards to stand up to their corrupt peers in order to stay faithful to their oaths and preserve the integrity of the federal courts, which demonstrates how widespread the corruption within the federal judiciary really is.

This decision represented not only obvious, clear and unmistakable intentional error, but because of the flagrant nature of the VA & these two court's dishonest and unfair actions in my case, it

clearly represents intentional error, as well as misconduct by both government and court officials. This means that many of the obvious errors that occurred, unless the SC intervenes, will now most likely never be fully or fairly considered. Thus, the dishonest, irresponsible and criminal behavior by the VA, DJ, and these two courts will be covered up.

DISCUSSION OF QUESTIONS PRESENTED

This single judge decision, because it has obvious and flagrant errors, does not and will not stand up to scrutiny from a qualified, objective, and honest reviewer. Yet, both CAVC and eventually on appeal to the CAFC both courts refused to review this seriously flawed single judge decision.

Knowing that these courts did not have or state a fair, reasonable, or even an objective bases for determining whether to review this decision, raise questions regarding the efficacy and fairness of the federal court review process. Due to the obvious and even flagrant nature of intentional errors by this single CAVC judge, this case clearly met any reasonable court standard for a judicial review.

A single judge decision with no review by other judges or Court's provides the lowest level of due diligence the court(s) can possibly provide and is also therefore the decision most susceptible to error, unfairness, and injustice. Especially in this case, where on two other previous occasions judges at CAVC had found my claim had merit and ordered the VA on remand to have examining physicians render qualified medical opinions regarding my claim, which was done and on both occasions ended up supporting my claim and not the VA.

Remember, this single judge decision had overturned the previous findings in two past CAVC decisions, so there was an ample reason for a review to reconcile or to try to understand why there was now a different decisions by the VA and the single judge, which should not be the case if its essentially based on many of the same facts, and evidence as in the past. If there was new evidence or laws that had not been considered in the past to justify a different decision by the courts, it was not presented.

The Department of Justice (DJ) role as the VA's defense attorney is also troubling. When you go to the DJ's web page their mission statement claims "to ensure fair and impartial administration of justice for all Americans". Yet, when DJ acts as a defense attorney, must it provide the best defense regardless of whether their client is right or wrong?

This is particularly onerous concern in this instance or where the DJ is defense consul for a government entity, such as the VA, against an American citizen and disabled veteran. It raises the question of what the DJ's obligations are when the VA made a bad decision or when VA officials have acted in an improper or unfair manner.

In these type instances, the DJ clearly has a conflict of interest, I.E. if the DJ helps the VA win by intentionally covering up error and/or misbehavior it is invariably denying justice and a fair trial to a veteran and a US citizen. Under the constitution the DJ can not cover up errors or improper behavior by other government agencies, nor deny an American citizen a fair trial, yet that is exactly what has occurred here and this represents not only unethical but criminal behavior by the DJ..

So, on review both CAVC and CAFC knew that this single judge decision was in conflict with

the two earlier CAVC decisions, as well as qualified expert medical opinion and that the veteran had new and additional evidence in support of his claim. If my case is reviewed by the SC it will be self evident that this single judge decision is in substantial error and that subsequent reviews by CAVC & CAFC intentionally covered this undeniable fact up.

It's clearly in the public interest, for the Courts to ensure that veterans especially disabled combat ones that put their lives on the line for their nation to receive proper due diligence regarding their claims and a fair trial before federal courts. When factual intentional errors are made by the VA and a single judge's decision that is not in compliance with law is shut off from possible review by other judges or other courts, something is obviously remiss.

The court rules or procedures for granting of a review or appeal should be set at the lowest possible level that's reasonable in order to ensure the rights of all veterans and American citizens to receive a fair and full hearing of their claims, especially in the case of a single judge decision, which is most susceptible to error.

If the government errs it should always do so to the benefit of veterans and citizens and not to the benefit of government, which the law, such as the "benefit of doubt doctrine" requires. This is clearly not what occurs when a veteran can not challenge a single judge decision and have it reviewed by other judges, especially one as contentious, convoluted, and contrived as this one.

Because the errors and deficiencies in this single judge decision are so obvious and even flagrant to be clearly intentional, if the SC will

simply review the briefs before these two courts and interview the VA and myself, it will soon become self evident that something is remiss and that this single judge decision should certainly not only have been reviewed, but also overturned.

The fact that it was not reviewed demonstrates that the checks and balance supposedly in place to minimize error and help ensure justice for Americans are not presently in place within our federal courts, especially when not only simple error, but also judicial incompetence and misconduct are clearly evident and ignored by the courts.

It seems that judges due to bias are reluctant to get involved in decisions where not only a judge's competence is in question, but also their ethics. Apparently, the courts would rather cover up or conceal judicial misconduct and/or errors in the mistaken belief it will somehow preserve the courts reputation for integrity.

This case represents a bad single judge decision which is not in compliance with the evidence or law and one that has been covered up due to irresponsible, dishonest and even criminal behavior by government officials in the VA, DJ and also by court officials.

In essence, this decision was <u>intentionally</u> fixed or rigged by the courts in favor of the government. In doing so, the courts not only committed a criminal act they obstructed justice and the constitutional mandated requirement for separation of power between the executive and judicial branches of government.

In addition, the courts violated my constitutional right to a fair trial and since judges

are under oath, intentional judicial misconduct also represents perjury or an additional criminal act by these two courts.

REASONS for GRANTING the PETITION

This represents a single judge decision that will not stand up to scrutiny and these two corrupt federal courts have intentionally tried to make certain this will not happen. The VA and the various subsequent court decisions all represent obvious, flagrant and intentional error.

Therefore the SC certainly has an obligation, as well as duty to intervene to protect the integrity of the federal judiciary. In essence, these two clearly biased, dishonest and irresponsible lower courts have intentionally rigged and fixed this severely flawed and very openly deficient single judge CAVC decision in favor of the government.

What the motive for this misbehavior might have been is open to question, but most likely its at least partially due to arrogance. Judges are not use to having their competence and ethics challenged. It's an undisputable fact that judges are merely human and there is no evidence to show that judges are any more honest then engineers, doctors, or even plumbers for that matter.

Therefore, judges are clearly affected by the same temptations, biases, and other human failings as every one else. Accepting that judges could behave unethically is not beyond the realm of possibility and should not be considered an unlikelihood.

In their arrogance, the judges involved with these dishonest decisions apparently believed they were above the law and that the same rules,

regulations, and laws that apply to common people certainly can not be applied to themselves.

Another possible motivating reason to explain the courts misbehavior is that I have been very critical, even openly disrespectful, about the competence and integrity of government and court officials, which could have and most likely has resulted in some significant animosity.

This may be and most likely is a factor here. None-the-less, this is still not an acceptable basis for these courts to have denied me a fair trial, especially since by their improper behavior they have proven my allegations were valid and truthful.

As I see it, the SC has two choices. It can do as CAFC did by arbitrarily refusing to review this single judge decision or secondly it can simply independently review the briefs before the two courts. Because of the obvious error in this decision, if the SC reviews my case it will find there are flagrant deficiencies, which the lower courts could have and should have addressed and corrected. These obvious errors would have been found and corrected in any properly functioning federal court.

Thus, it is obvious that something is very remiss here and <u>intentional</u> judicial misconduct has occurred.

Because of the importance of the constitutional and criminal issues raised herein and to ensure and preserve the integrity of the federal judiciary, I strongly plead for the SC to review this unfair and dishonest single judge decision, as well as the subsequent court decisions in my case.

The issues at stake here are certainly too high for the SC to simply arbitrarily ignore and

arbitrarily dismiss as has already occurred at the CAVC & CAFC.

The simplest and most expedient way to accomplish reviewing my case would be to have an independent, objective, and well qualified independent legal expert to review the briefs and other correspondences related to this single judge decision, as well as the subsequent court decisions. Then, preferably for the independent reviewer should also hear verbal arguments from both the VA and myself.

This independent legal expert could be from SC staff or preferably from a law school or a practicing attorney familiar with veteran's claims and law.

I also hope, as an unrepresented disabled combat veteran and us citizen with no legal background, the SC will give me some leeway in pursuing my case and justice before this prestigious court.

While my claims of corrupt and criminal behavior by both government and court officials are disturbing, everything I have presented here is accurate and truthful. These are much too serious of matters before this court to be ignored or arbitrarily dismissed without some consideration or review to determine its validity.

There is no more important matter that could possibly come become before this court than the integrity of the members from our nations government agencies and/or the federal judiciary.

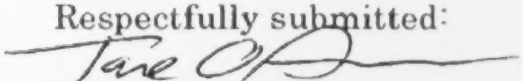
Finally, veteran's claims should be decided solely based on its merits and conformance with the law and not determined based on bad and improper behavior by government and/or court officials, as has

occurred here. If this court reviews this case, there will be many government and court officials in serious trouble, if not these same corrupt individuals will be emboldened to continue abusing their power and authority and essentially have a SC mandate for violating the rights of the American citizenry.

CONCLUSIONS

The petition for a writ of certiorari should be granted.

Respectfully submitted:



Tore Olav Arnesen
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(303) 465-3353

February 16, 2010

No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

RESPONDENT: Tore Olav Arnesen

VS.

RESPONDENTS: Veterans Administration; Justice Department; United States Court of Appeals for Veteran Claims; and United States Court of Appeals to the Federal Circuit

PROOF OF SERVICE

I, Tore Olav Arnesen, do swear or declare that on this date, February 15, 2010 and revised document on April 19, 2010, as required by Supreme Court Rule 29, I have served the enclosed PETTION FOR A WRIT OF CERTIORARI on each party to the above proceedings or that parties counsel, and on every party required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with pre-paid first-class postage.

The names and addresses of those served are:
1. General Council, Veterans Administrations, 810 Vermont Ave, Washington DC 20420
2. Clerk of the Court, United States Court of Appeals for Veteran Claims, 625 Indiana Avenue NW, Suite 900, Washington DC 20004-2950
3. Solicitor General of United States Department of Justice, 1 First Street NE, Washington DC 20543
4. Ms. Jan Horbaly, Clerk of the Court, Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington DC 20439

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 15, 2010

Tore O [illegible] (Signature)

16 April 2010

APPENDIX 'A'

Designated for electronic publication only
UNITED STATES COURT of APPEALS for
VETERANS CLAIMS
No. 07-0444

Tore O. Arnesen, Appellant,

v.

James B. Peake, M.D.,
Secretary of Veterans Affairs, Appellee.

Before LANCE Judge

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a)
This action may not be cited as precedent

LANCE, Judge: The pro se appellant, Tore O. Arnesen, appeals a February 12, 2007, decision of the BVA denying his claims for (1) service connection for generalized arthritis, including crystallized arthritis or calcium pyrophosphate dehydrate (CPPD) dieses, (2) an evaluation in excess of 10% for right knee chondromalacia and degenerative joint dieses (DJD), (3) an initial evaluation in excess of 10% for left knee chondromalacia and DJD, postoperative, and (4) entitlement to an effective date earlier than February 14, 1986, for his left knee condition. Record (R.) at 1-40. In his decision, the Board also remanded the appellant's claim for entitlement to service connection for arthritis of the fingers and hands as well as whether the appellant has submitted new and material evidence sufficient to warrant reopening of his claim for interest on an earlier award of service connection for a left knee disability. R. at 36-38. These claims, therefore, are not before this Court. See Howard v. Gober, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

In his informal brief, the appellant states that "the issues under Appeal to this Court are" the increased rating claim chondromalacia and DJD for both knees, and entitlement to an earlier effective date for his left knee chondromalacia and DJD. Appellant's informal brief (Br.) at 1. The appellant specifies that "ISSUE 1 is dismissed" and that ISSUES 2 & 3 are being remanded." Id. The Court construes the issues cited by the appellant to correspond with those listed in the Board decision on appeal; therefore, because the appellant does not present any argument concerning the first issue listed in the Board decision, his claim for service connection for generalized arthritis, including CPPD dieses, the Court deems to be abandoned. See Ford v. Gober, 10 Vet. App. 531, 535 (1997). This appeal, therefore , is limited to the appellant's claims for increased evaluations for his bi-lateral knee condition and for an earlier effective date for his left knee condition, including his allegations of clear and unmistakable error (CUE) in an April 1970 regional office (RO) decision. Single-judge disposition is appropriate, See Frankel v. Derwinski, 1 Vet. App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. $$ 7252(a) and 7266(a). For the reasons set forth below, the Court will affirm the February 12, 2007, Board decision.

I. FACTS

The appellant served in the U.S. Army from July 1966 to March 1970, Record (R.) at 43. In March 1970, the appellant filed a claim for service connection for arthritis of the right knee. R. at 94. In April 1970, the RO issued a rating decision granting

the appellant a 10% disability rating for his right knee condition. R. at 97.

In May 1970, the appellant filed an informal claim for service connection for a left knee condition. R. at 97. In June 1970, the RO issued a rating decision denying the appellant's claim. R. at 102. VA did not, however, issue a Statement of the Case (SOC) and the claim remained open. In January 1982, the appellant apparently sent a letter to the RO, again requesting service connection for his left knee. R. at 181-82. In July 1982, the appellant filed a Notice of Disagreement (NOD) and thereafter received a SOC. R. at 184-87.

In September 1982, the appellant testified at hearing before the Board. R. at 243-9. In July 1983, the Board issued a decision affirming the RO's denial of the appellant's claim for service connection for a left knee disorder. R. at 243-49. After receiving two additional letters from the appellant, the Board reconsidered its earlier decision. R. at 290-96. In October 1985, the Board determined that its 1983 decision was correct, thus rendering that decision final. R. at 290-96.

In February 1986, the appellant filed a claim to reopen his previously denied claim for service connection for his left knee condition. R. at 318. In May 1986, the Denver, Colorado, RO issued a letter denying the appellant's claim. R. at 322. That same month, the appellant filed an NOD a requested a hearing. R. at 324. In July 1986, VA provided the appellant with an SOC and the appellant thereafter filed a substantive appeal. R. at 327-30, 332-39.

In September 1986, the appellant testified in a hearing before the Board. R. at 341-66. In January 1988, the Board affirmed the RO decision and

determined that the appellant's submissions since the prior Board decision were cumulative and not new material. R. at 433-40. Thereafter, the appellant continued to submit documentation which he believed supported a claim for service connection for a left knee disability. See R. at 31.

In December 1990, the RO granted the appellant service connection for chondromalacia of the left knee with traumatic arthritis, postoperative, and assigned a 10% disability rating, effective February 14, 1986, the date that the RO considered that claim reopened based on continuous prosecution with the submission of new and material evidence. R. at 552-54. The RO combined the diagnostic code (DC) for the left knee with that for the right knee disorder, DC 5010, resulting in a 20% combined disability evaluation. R. at 552-54. The appellant disagreed with the ratings and perfected an appeal to this Court.

In December 1995, this Court remanded the matter for, inter alia, an inadequate statement of reasons or bases supporting the Board's determination regarding the appellant's limitation of range of motion. R. at 804-05. The Court instructed the Board to specify its findings in the terms used in sections 5260 and 5261 of the DC, concerning extension and flexion limitations, to address the appellant's contention that his arthritis was degenerative rather than traumatic, and to consider the effects of pain on range of motion. R. at 804-05.

On February 1, 1999 , the Board issued a decision denying an increased evaluation for bilateral knee chondromalacia and arthritis in excess of the 20% disability rating and denying an effective date earlier than February 14, 1986, for an

award of service connection for a left knee disorder. R. at 1519-60. The appellant appealed to this Court.

In October 2000, this Court affirmed the Board's denial of the appellant's claims for an increased evaluation for his bilateral knee disorders and for an earlier effective date for his left knee condition. R. at 1604-16. In April 2001, on reconsideration, this Court remanded the claims in light of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096.

In November 2004, the VA conducted another medical examination. R. at 1899-1912. In December 4, 2006, the Board issued the decision on appeal. R. at 1-40.

I-ANALYSIS

A. Increased Ratings Claims

In his informal brief, the appellant goes to great lengths to express his disagreement with the diagnostic codes contained in 38 C.F.R. Parts 3 & 4 and urges this Court to compel the Secretary to adopt the changes that were proposed in the Federal Register in February 2003. See Appellant's informal Br. At 1-23. In his informal reply, the appellant conceded that

> My claim for an 'increased disability for both knees' rests entirely on whether the current law, regulations, and Schedule for Ratings represents good and satisfactory medical practice or whether it's outdated and insufficient for fairly and properly evaluating and treating veterans. If this Court decides it is still satisfactory, then my Claim is invalid.

Appellant's Informal Reply Br. At 7.

To the extent this comprises the whole of the appellant's argument with regard to his increased

ratings claims; the Court concludes that it is fatally deficient in two important respects. First, as the Secretary notes in his brief, the proposed changes were withdrawn by the Secretary on March 5, 2004. Second, and more important, the Court lacks jurisdiction to review what the Secretary considers an appropriate disability rating for a specific symptom under the rating schedule. 38 U.S.C. $ 7252(b) ("The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revisiting that schedule."); see Wanner v. Principi, 370 F.3d 1124, 1131 (Fed. Cir. 2004) (holdings that "the content of the rating schedule...is indistinguishable from the review of 'what should be considered a disability'").

To the extent that the appellant's informal brief can be construed as alleging any other error concerning these claims, his arguments must similarly fail. A disability rating determination is a finding of the of fact that this Court reviews under the "clearly erroneous" standard. See Smallwood v. Brown, 10 Vet. App. 93, 97 (1997); see Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990) (Court reviews Board's findings of fact under the "clearly erroneous" standard). The appellant has not alluded to any instance of Board error in this Court, upon review of the decision and the record of appeal, cannot conclude that the Board's findings were clearly erroneous.

B. Earlier Effective Date Claim

1. Non-CUE Effective Date Claim

"The effective date of an award (of service connection) based on...a claim reopened after final adjudication...shall be fixed in accordance with the

facts found, but shall not be earlier than the date of receipt of application therefore." 38 U.S.C. $ 7261(a)(4); Perry, supra; Gibert, 1 Vet App. At 53.

Here, the Board determined that the veteran's claim for service connection for left knee arthritis had been previously and finally denied by the July 1983 Board decision and affirmed in October 1985. R. at 31. The Board correctly noted that, based on his submissions after the Board's January 1988 decision, the veteran's effective date, as determined by the RO in December 1990, should not have been fixed earlier than January 1988. R. at 31. Though the RO was incorrect in assigning the effective date earlier than January 1988, the Board did not reverse the RO's error and the Court will not disturb findings favorable to a veteran. See Roberson v. Principi, 17 Vet. App. 135, 139 (2003). Because the appellant received an earlier effective date than he shields have based on applicable law, however, the Board's determination that the appellant is not entitled to an earlier effective date earlier than February 14, 1986, is not clearly erroneous. See 38 U.S.C. $$ 5110(a), 7261(a)(4); 38 C.F.R. $ 3.400(b)(2); Perry, supra; Gilbert, supra.

2. Earlier Effective date based on CUE

A VA decision that has become final generally may not be reversed or amended in the absence of CUE. See 38 U.S.C. $ 5109A, 7111,; 38 C.F.R. $ 3.105(a); see also 38 U.S.C. $$ 5108, 7105(c). A claim of CUE is a collateral attack on a final decision by an RO or the Board. See Disabled Am. Veterans v. Gober, 234 F.3d 682, 696-98 (Fed. Cir. 2000). CUE claims as to RO decisions are permitted by 38 U.S.C. $ 5109A, 38 U.S.C. $ 711 authorizes such claims as to Board decisions. Both statutes contain identical

language: "If evidence establishes the error, the prior decisions shall be reversed." 38 U.S.C. $$ 5109A(a), 7111(a); see also 38 C.F.R. $$ 3.105(a), 20.1403(a).

"' In order for a claim of (CUE),...(t)he claimant, in short, must assert more than disagreement as to how facts were weighed or evaluated.'" Crippen v. Brown, 9 Vet. App. 412, 418 (1996) (quoting Russell v. Principi, 3 Vet. App. 310, 313 (1992) (en banc)) Moreover, a CUE claim must identify the alleged error(s) with "some degree of specificity." Id. At 420; Fugo v. Brown, 6 Vet. App. 40, 44 (1993) ("to raise CUE there must be some degree of specificity as to what the alleged error is and...persuasive reasons must be given as to why the result would have been different."); Bustos v. West, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999) (adopting this Court's interpretation of 38 C.F.R. $ 3.105). To establish CUE in a final decision of an RO or the Board's, a claimant must prove

> (1) that either the facts known at the time were not before the adjudicator or the law then in effect was incorrectly applied, (2) that an error occurred based on the record and the law that existed at that time the decision was made, and (3) that, had the error not been made, the outcome would have been manifestly different.

Grover v. West, 12 Vet. App. 109, 112 (1999); see also Damrel v. Brown, 6 Vet. App. 242, 245 (1994); Russell, 3 Vet. App. At 313. CUE is a sort of error that is "undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." Russell, 3 Vet. App. at 313-14. To establish CUE it must be clear from the face of the

RO decision that a particular fact or law had not been considered in the RO's adjudication of the case. See Crippen, 9 Vet. App. At 421 (citing Eddy v. Brown, 9 nVet. App. 52, 58 (1996)).

This Court does not have the jurisdiction to review a CUE claim unless it has been previously adjudicated by the Board. See Sondel v. Brown, 6 Vet. App. 218, 220 (1994); Russell, 3 Vet. App. At 315-15; see also Bradley v. Principii, 14 Vet. App. 255, 257 (2001) (Court lacked jurisdiction to over appellant's claim improperly and improvidently raised for the first time on appeal to the Court). In Reviewing Board decisions evaluating allegations of CUE in prior final decisions, the Court "cannot conduct a plenary review of the merits of the original decision." Archer v. Principi, 3 Vet. App. 433, 437 (1992). On appeal of a Board determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," including whether the decision is supported by an adequate statement of reasons or basis. 38 U.S.C. $$ 7261(a)(3)(A). 71043(d)(1); see Lane v. principi, 16 Vet. App. 78, 83-84 (2002), aff'd, 339 F.3d 1331 (Fed. Cir. 2003) (affirming this Court's longstanding precedents regarding standard of review in CUE determinations); Beyrle v. Brown, 9 Vet. App. 377, 382 (1996); Eddy, 9 Vet. App. At 57; Russell, 3 Vet. App. At 315.

a. 1970 RO Decision

The first question that the Court must resolve is whether the appellant may attack the 1970 RO decision on the basis of CUE. In his informal brief, the appellant "allege(s)

Error of fact and law in the 1970 Board (d)ecision." Appellant's Informal Br. At 24. The Secretary argues that the 1970 ROI decision, which remained open as a result of VA's failure to issue SOC, and the 1982 RO decision were both subsumed in the 1983 Board decision, which was affirmed on reconsideration by the 1985 Board decision. Secretary's Br. At 25. In the decision here on Appeal, the Board found that all prior RO decisions have been subsumed in later Board decisions and "the veteran's CUE argument in this case thus pertains solely to the Board's last final decision denying the veteran service connection...issued in July 1983 and affirmed...in October 1985." R.at 32.

A claimant may not attack an RO decision on CUE when the decision has been appealed and affirmed by the Board. See Chisen v. Gober, 10 Vet. App. 526, 527, (1997). Here, the Board, in 1983, considered all the evidence then of record and concluded that the appellant's left knee condition had not been "incurred or aggravated during active service" and was "not proximately due to or the result of a service connected disease or injury." R. at 243-50. Accordingly, the Court holds that the 1983 Board decisions subsumed the 1982 RO decisions and that the Board's determinations that the earlier RO decisions are not changeable on the basis of CUE was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 38 U.S.C. $ 7261(a)(3)(A); se brown v. West, 203 F. 3d 1378, 1381-82 (Fed. Cir. 2000) (recognizing and affirming subsuming doctrine in cases where prior Board decisions had "conducted a full review of the evidence that had previously been before the RO and held that the RO had correctly denied...(the earlier)

claim"); see Dittrich v. West, 163 F.3d 1349, 1352-53 (Fed. Cir. 1998); Donovan v. West , 158 F.3d 1377, 1381-82 (Fed. Cir. 1998). The Board, therefore, was correct in concluding that the appellant's CUE argument is limited to the 1983 and 1985 Board decisions.

b. 1983 and 1985 Board Decisions

As noted above, a claimant alleging CUE must do so with specificity. Here, the appellant specifically describes several incidents of alleged error. First, the appellant argues that the RO failed to provide him with a medical examination as part of its 1970 adjudication. Appellant's informal Br. At 25. Second, the appellant contends that the Board improperly changed his diagnosis from arthritis to chondromalacia. Id. Third, the appellant argues that the Board did not properly take into account the fact that he is a combat veteran. Finally, the appellant asserts that there are several "newer" facts which demonstrate that he suffered from a left knee condition prior to active duty. Id. At 26.

VA regulations specify several examples of "situations that are clear and unmistakable error." 38 C.F.R. $ 20.1403. Among these are a changed diagnosis, or one that corrects an earlier diagnosis; any situation arising under the Secretary's duty to assist, such as the Secretary's duty to, under certain circumstances, provide a claimant with medical examinations; and a claimants disagreement with the Board's evaluation of the evidence. Id.

Taking the appellant's last argument first, it is well settled that "newer" facts cannot form the basis of a CUE attack. See Grover, supra. A CUE allegation must be based on the decision made with regard to the facts and law as they existed at the

time of the adjudication; post hoc changes to the factual basis of a claim may not serve as the foundation of a CUE motion. See 38 C.F.R. $ 21.1403(a). Accordingly, to the extent that the appellant argues that the new facts not before the Board in 1983 and 1983 support the CUE motion, his argument is without merit.

The Court next examines the appellant's assertion that the VA erred in not affording him a medical examination in 1970, an argument that it finds lacking in two important respects. First, as a this contention was not raised and decided at the Board level, the Court does not have jurisdiction to review the issue on appeal. See Russell, supra. Second, assuming, arguendo, that it could review this issue, the Court holds that the RO's alleged failure to provide a medical examination in 1970 does not constitute CUE. As the Secretary correctly notes, this allegation is in the nature of a duty to assist deficiency, which is expressly outside of the ambit of CUE. 38 C.F.R. $ 20.1403(d)(2); see 38 U.S.C. $ 5103A(d)(2); see 38 C.F.R. $ 3.159(c)(4).

With regard to the appellant's assertion concerning the alleged change in the diagnosis for his left knee condition, the board correctly notes that this allegation amounts to the appellant's disagreement with the Board's evaluation of the evidence, which cannot form the basis of a CUE motion. R. at 35; see C.F.R. $ 20.1403(d)(3). The Board, in 1983, had before it a record that included diagnosis of arthritis as well as chondromalacia. Id. At that time, the Board fully weighed and accounted for the evidence and found that, "based on the dates of those diagnoses, the veteran's left knee arthritis did not manifest to a compensable degree within a

year of his discharge." R. at 36. The 1983 Board decision also included a finding that the appellant's left knee condition, whether arthritis or chondromalacia, was not service connected. R. at 34, 247-48. The appellant cannot now attack the 1983 decision on the basis of his disagreement with the Board's weighing of the evidence.

The Court next takes up the appellant's contention that the Board's failure to discuss his status as a combat veteran in its 1983 decision constitutes CUE. In the decision on appeal, the Board acknowledges that, in 1983, it failed to discuss the appellant's combat status. R. at 35. Though the Board admitted error, however it concluded that "such error does not compel the conclusion, to which reasonable minds could not differ, that the results would have been manifestly different but for the error. Id. The Court agrees. The CUE standard requires. The CUE standard requires a claimant to show that the error in question rendered the decision fatally flawed and that, but for the error, the result would have been manifestly different. See Russell, supra. As noted above, the Board, in 1983, adequately weighed and accounted for the evidence of record in reaching the conclusions that the appellant's left knee condition was not service connected. The Court cannot hold that, had the Board taken into account the appellant's combat status, it would have certainly found otherwise. Accordingly, the Court concludes that the Board decision findings that the 1983 and 1985 decisions did not contain CUE was not "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. $ 7261(a)(3)(A).

III. CONCLUSION

After the Court's consideration of the appeal Lents and the Secretary's briefs, and its review of the record, the Board's February 12, 20907, decision is AFFIRMED.

Dated: December 17, 2008 Copies to:
Tore O. Arnesen; VA General Council (027)

Ignited for electronic publication only
UNITED STATES COURT of APPEALS for VETERANS CLAIMS

No. 07-0444
Tore O. Arnesen, Appellant,
v.
Eric K. Shinseki,
Secretary of Veterans Affairs, Appellee.

Before MOORMAN, LANCE, and SCHOELEN, Judges

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a)
This action may not be cited as precedent

In a single-judge decision dated December 17, 2008, the Court affirmed the December 4, 2006, Board of Veterans' Appeals decision that denied, in part, the appellants claims for an evaluation in excess of 10% for right knee chondromalacia and degenerative joint dieses, postoperative arthroplasty; an initial evaluation in excess of 10% for left knee chondromalacia and DJD, postoperative; and entitlement to an effective date earlier than February 14, 1986, for a left knee condition. On December 29, 2008, the appellant filed a timely motion for a panel decision.

Upon consideration of the foregoing, the prior pleading of the parties, and the record on appeal, it is

ORDERED that the motion for a panel decision is denied.

Dated March 12, 2009 PER CURIAM

Copies to:

Tore O. Arnesen, VA General Council (027)

Note: This order is nonpresidential

UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT

2009-7086

TORE O. ARNESEN, Claimant-Appellant

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs

Respondent-Appellee

Appeal from the United States Court Of Appeals for Veterans Claims in 07-0444,

Judge Alan G. Lance, Sr.

ON MOTION

ORDER

Appellants request for panel reconsideration of the court's order dismissing the appeal for lack of jurisdiction having been denied by the court on December 15, 2009, and his request for en banc reconsideration having been circulated to the circuit judges who are in regular service,

UPON CONSIDERATION THEREOF, it is

ORDERED that Appellant's request for en banc reconsideration be, and the same hereby is, DENIED.

The mandate of the court has already issued.

Dated: December 30, 2009 For the Court,

Jan Horbaly, Clerk

Cc: Tore O. Arnesen
John S. Grout

Filed
U.S. Court of Appeals for the Federal Circuit
DEC 30, 2009
Jan Horbaly, CLERK, December 15, 2009

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-0444

Tore O. Arnesen, Appellant,

v.

Erik K. Shinseki, Appellee.

Before MOORMAN, LANCE, and SCHOELEN, Judges

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a) This action may not be cited as precedent

In a single judge decision dated December 17, 2008, the Court affirmed the December 4, 2006, Board of Veterans Appeals decision that denied, in part, the appellant's claims for an evaluation based in excess of 10% for right knee chondromalacia and degenerative joint dieses, post operative arthroplasty, an initial evaluation in excess of 10% for left knee chondromalacia and DJD, postoperative, and entitlement to an effective date earlier than February 14, 1986, for a left knee condition. On December 29, 2008, the appellant filed a timely motion for a panel decision.

Upon consideration of the foregoing, the prior pleadings of the parties, and the record on appeal, it is

ORDERED that the motion for a panel decision is denied

DATED: March 12, 2009 PER CURIAM

Copies to:
Tore O. Arnesen
VA General Council (027)

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
625 Indiana Avenue, NW, Suite 960
Washington, DC 20004-2950

April 29, 2009

RE: Tore O. Arnesen
Our Case No. 07-044

Dear Mr. Horbaly:

Enclosed is a notice of appeal to your court. It was received by the Court on March 25, 2009.

No Judgment has been entered by this Court. A copy of the docket is enclosed.

A total of 0 days elapsed between decision or judgment and receipt of the appeal, counting the first day after the decision or judgment was entered. Section 7292(a), title 38, United States Code, requires that a notice of appeal of the decision of this Court be filed within 60 days after this Court's entry of judgment order.

Sincerely,
Norman Y. Herring
Clerk of the Court

Enclosures
Appeal Information Sheet
wc

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal Information Sheet

From United States Court of Appeals for Veteran Claims

Type of Case:

Tore O. Arnesen
Appellant (X) Petitioner ( ),

v.

Erik K. Shinseki, Secretary of Veterans Affairs,
Appellee (X) Respondent ( )

Docket No. 07-0444

Decision date: December 17, 2008

Cross or related appeal? 94-189, 99-948

Notice of Appeal date: March 25, 2009

Appellant is Veteran/Claiment (X)

Appellant's Attorney ( )

Secretary of Veterans Affairs ( )

Fees:

Was Court of Appeals Docket Fee Paid? NO

Is this an appeal by U.S.? NO

Is forma pauperis granted? (X)

denied ( ) Never requested ( )

Is this matter under seal? (NO)

Counsel for: Tore O. Arnesen, Pro se

Council for Secretary of Veterans Affairs:

Edward V. Cassidy, Jr., Esq.
Office of General Council (027)
810 Vermont Ave.
Washington, DC 20420

Attachments
Decision appealed from
Notice of Appeal
Certified docket entries

Norman Y. Herring
Clerk of Court
By: /s/ Willette Cash
Date: April 29, 2009

APPENDIX 'B'

Note: This order is nonpresidential

UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT

2009-7086

TORE O. ARNESEN, Claimant-Appellant

v.

ERIC K. SHINSEKI, Secretary of Veterans Affairs

Respondent-Appellee

Appeal from the United States Court Of Appeals for Veterans Claims in 07-0444,

Judge Alan G. Lance, Sr.

ON MOTION

Before MAYER, CLEVENGER, and RADAR, Circuit Judges

ORDER

The Secretary of Veterans Affairs moves to waive the requirements of Fed. Cir. R. 27(f) and dismiss for lack of jurisdiction Tore O. Arnesen's appeal from a decision of the U.S. Court of Appeals for Veteran Claims affirming the Board of Veterans' Appeals decision denying Arnesen's claim for increased evaluation for bilateral knee condition and earlier effective date of disability for his left knee. Arnesen opposes. The Secretary replies. Arnesen moves for leave to file a response to the Secretary's reply

Arnesen served in the military from July 1968 to March 1970. In March 1970, Arnesen filed a claim seeking service connection for arthritis in his right knee. The DVA granted him a 10% disability rating . Arnesen then sought service connection for his left knee condition in May 1970, which the DVA denied. After numerous appeals and submissions, in December 1990, the DVA granted Arnesen a 10%

disability rating for his left knee, effective February 14, 1986. Subsequently, the DVA combined the diagnostic code for his left knee and right knees resulting in a 20% combined disability evaluation.

Following various appeals to the Board, the Court of Appeals for Veterans the Board's (CAVC) decision denying Arnesen's claim for increased disability overall and an earlier effective date for his left knee condition. The CAVC concluded that the Board acted within it's discretion in denying his disability rating and in refusing an earlier effective date for Arnesen's left knee condition. Additionally, CAVC concluded that pursuant to 38 USC $ 7252(b), it did not have jurisdiction to review Arnesen's claim requesting review of the provisions of the VA's rating schedule. Arnesen appealed to this court.

The Secretary moves this court to dismiss Arnesen's appeal because he does not raise any issue in his informal brief within this court's jurisdiction. Our jurisdiction to review decisions of CAVC is limited. See Forshev v. Principi, 284 F.3d 1335, 1338 (Fed. Cir. 2002) (en banc). The court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 USC $ 7292(d)(2). Additionally, this court may not review "a refusal (by the CAVC) to review the schedule of ratings for disabilities." 38 USC $ 7292(a).

In his informal brief, Arnesen essentially argues that the DVA's present method of rating disabilities is unlawful and does not meet current medical standards and that the Board did not consider the proper evidence in determining the effective date for his left knee condition. Because

Arnesen fails to raise an issue within our jurisdiction, we must dismiss this appeal.

Accordingly,

IT IS ORDERED THAT:

(1) Arnesen's motion for a response is granted.

(2) The Secretary's motions are granted. The Appeal is dismissed.

(3) Each shall bear its own cost.

FOR THE COURT

JUL 30 2009 — /s/ Jan Horbaly

Date — Jan Horbaly
Clerk\

Cc: Tore O. Arnesen
John S. Groat, Esq.

S20 FILED US COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ISSUED AS A MANDATE: JUL 30 2009

JUL 30 2009 Jan Horbaly Clerk

Note: This order is nonpresidential

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CICUIT

2009-7086

Tore O. Arnesen, Claimant-Appellant

v.

Erik K. Shinseki, Secretary of Veteran Affairs, Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims in

07-0444, Judge Alan G. Lance, Sr.

ON MOTION

Before MAYER, CLEVENGER, and RADER, Circuit Judges.

Per Curiam.

ORDER

Tore O. Arnesen moves for panel reconsideration en banc of the court's dismissing his appeal for lack of jurisdiction.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion for panel consideration is denied. The request for en banc reconsideration will be circulated to the full court.

FOR THE COURT

DEC 15, 2009 — /s/ Jan Horbaly

Date — Jan Horbaly, Clerk

Cc: Tore O. Arnesen — Filed

John S. Groat, Esq.

Note: This order is nonpresidential

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CICUIT

2009-7086

Tore O. Arnesen, Claimant-Appellant

v.

Erik K. Shinseki, Secretary of Veteran Affairs, Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims in 07-0444, Judge Alan G. Lance, Sr.

ON MOTION

ORDER

Appellant's request for panel reconsideration of the court's order dismissing the appeal for lack of jurisdiction having been denied by the court on December 15, 2009, and his request for en banc

reconsideration having been circulated to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is ORDERED that appellant's request for en banc reconsideration be, and the same hereby is DENIED.

The mandate of the court has already issued.

FOR THE COURT,

Dated: December 30, 2009 Jan Horbaly, Clerk

Cc: Tore O. Arnesen, FILED
John S. Grout

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, DC 20439

Jan Horbaly, Clerk Jan 29, 2010

Telephone: 633-6550, Area Code, 202

Tore O. Arnesen
1330 Bellaire Street
Broomfield, CO 80020

RE: Arnesen v. DVA, 2009-7086

Dear Mr. Arnesen:

This is in response to your letter concerning your case received on December 28, 2009.

Your case was dismissed for lack of jurisdiction. Your petition for rehearing en banc was denied on December 30, 2009. The court's rules do not provide for further submissions in this matter. Thus, your case is over in this court.

Very truly yours,
/s/ Jan Horbaly
Jan Horbaly

Jh/ds
Cc: John S. Grout, Esq.